

Q.630.7
I l 6c
no.1355

NOTICE: Return or renew all Library Materials! The *Minimum Fee* for each Lost Book is \$50.00.

The person charging this material is responsible for its return to the library from which it was withdrawn on or before the **Latest Date** stamped below.

Theft, mutilation, and underlining of books are reasons for disciplinary action and may result in dismissal from the University.
To renew call Telephone Center, 333-8400

UNIVERSITY OF ILLINOIS LIBRARY AT URBANA-CHAMPAIGN

4/17/03

L161—O-1096



30.7
26c
no. 1355

Illinois Drainage Law

Including Soil Erosion
and Sedimentation Control,
Permit Requirements
for Construction in Streams
or Floodways, and Federal
Wetlands Provisions

JAN 15 1997
AGRICULTURE LIBRARY

By D. L. Uchtmann and Bernard Gehris

College of Agricultural, Consumer and Environmental Sciences
University of Illinois at Urbana-Champaign
Cooperative Extension Service • Circular 1355

The authors would like to acknowledge the assistance of attorneys Mary Perlstein, Champaign, Illinois, and David Rolf, Springfield, Illinois, for their assistance with the 1991 circular on this topic. The authors would also like to acknowledge the valuable assistance of Gene Barickman, state biologist, Natural Resources Conservation Service, regarding the discussion of wetlands.

Cover photo: A well-maintained drainage ditch.

Edited by Peggy Currid and Pam Johnson

Designed by Krista L. Sunderland

Formatted by Oneda VanDyke

Urbana, Illinois

December 1997

Issued in furtherance of Cooperative Extension Work, Acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Dennis R. Campion, *Interim Director*, Cooperative Extension Service, University of Illinois at Urbana-Champaign. The Illinois Cooperative Extension Service provides equal opportunities in programs and employment.

2M—12-97—UI Printing Division—PC

Printed on recycled paper.



College of Agricultural, Consumer and
Environmental Sciences



6, 630, 7
22 62
00. 1355

Illinois Drainage Law

Including Soil Erosion
and Sedimentation Control,
Permit Requirements
for Construction in Streams
or Floodways, and Federal
Wetlands Provisions

This circular was written by Donald L. Uchtmann, professor of agricultural law and Extension specialist, and by Bernard Gehris, research assistant in agricultural law.

College of Agricultural, Consumer and Environmental Sciences
University of Illinois at Urbana-Champaign
Cooperative Extension Service • Circular 1355



■ Contents

Preface	v
Part I. Illinois Rules of Drainage	1
Laws of Natural Drainage	1
Statutory Enlargement of Rules of Natural Drainage	7
Part II. Illinois Laws on Drainage Districts	14
Organization of Districts	16
Organization of Outlet, Mutual, and User Districts	17
Important Rules Laid Down by the Courts	18
Powers and Duties of Commissioners	19
Drainage Record	22
Owners' and Districts' Rights and Duties Concerning Ditches and Drains	22
Part III. Drainage and the Regulation of Wetlands	25
The Wetlands Provisions of the Food Security Act of 1985, as Amended	25
Prior Converted Cropland	28
Wetland	28
Farmed Wetland	29
Converted Wetland	29
Farmed-Wetland Pasture	30
Artificial Wetland	30
Permit Requirements for Construction in Streams or Floodways	32
Part IV. Illinois Soil Erosion and Sedimentation Control	36
Soil and Water Conservation District Guidelines for Erosion and Sediment Control	36
Enforcement of the Guidelines	37
Glossary	40



■ Preface



Illinois wetland. The remaining wetlands in Illinois have important ecological and hydrologic value. Federal policy now discourages conversion of wetlands to farmland.

This circular describes the drainage law that is applicable to the entire state of Illinois and to drainage districts. It also summarizes related laws, such as the guidelines for erosion and sediment control and the permit requirements for construction in streams or floodways. Its purpose is to inform landowners, drainage district commissioners, land improvement contractors, and other interested people of general legal principles related to drainage and the construction of drainage improvements. With this general information, they are better able to recognize opportunities for improving drainage or situations where their drainage rights have been unlawfully impaired. Helpful background information is also provided about drainage disputes and about the creation or activation of a drainage district; however, in these situations, the assistance of a practicing attorney will be needed.

Since the passage of the wetlands provisions of the Food Security Act of 1985, the federal government has also influenced drainage decisions. As a result of this act, landowners need to know not only which actions are permitted or precluded by state drainage law but also which actions might jeopardize their rights to participate in programs of the U.S. Department of Agriculture (USDA). The wetlands provisions in federal law and their potential impact on farm drainage activity are described in Part III of this circular.

Technical terms and legal terms commonly encountered in drainage law are defined in the glossary for convenient reference. These terms appear in SMALL CAPS in the text.



■ Part I

Illinois Rules of Drainage

Laws of Natural Drainage

Basic law recognizes natural differences in levels of lands.

The basic principle of the law of natural drainage is that LANDOWNERS take whatever advantages or inconveniences of drainage nature places upon their land. What these advantages or inconveniences are ultimately depends on the level of one's property in relation to the land around it.¹

A landowner must receive surface water flowing naturally from higher ground. One of the most important principles of Illinois drainage law is that the owners of lower ground, known as a SERVIENT TENEMENT, are bound to receive surface water that naturally flows onto it from higher ground, known as the DOMINANT TENEMENT (Figure 1).²

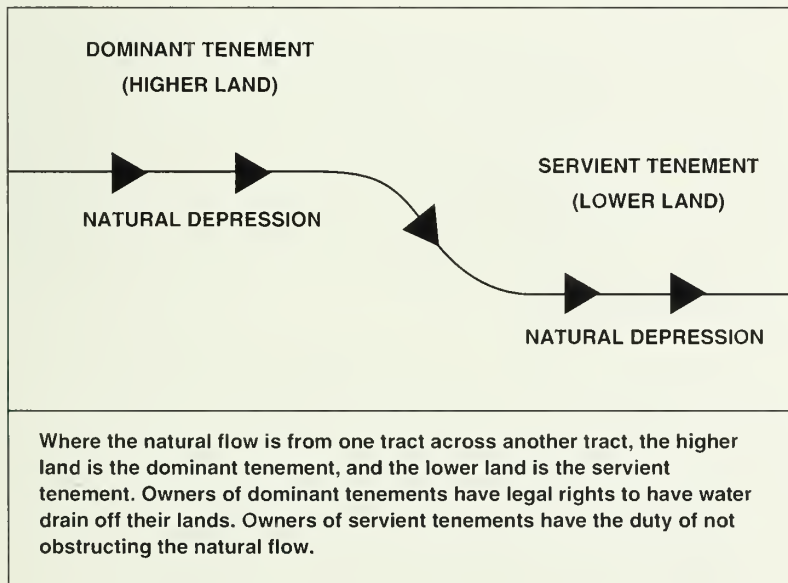


Figure 1.
Dominant and
servient
tenements.

This rule means that owners of farms that are lower than adjoining farms must take the water that flows through natural depressions onto their land. Likewise, unless a city has adopted a system of artificial drainage, owners of lots that are lower than adjoining lots must receive the water

coming from the higher lots. It also means that a railroad or a highway embankment must be built with openings of sufficient capacity and in appropriate locations to accommodate water that would naturally flow across the right-of-way in a STATE OF NATURE.

Whether or not the rule applies to diffused water, which does not flow in a defined channel, is debatable. Although it appears that the Illinois rule on natural drainage includes diffused surface water, the Illinois courts have not yet made their final determination of this question.³

A landowner may collect surface water, discharge it, and hasten its flow to lower ground. If the law had limited the right of the owner to drain higher land just as it had been drained in a state of nature, the law would have been of little real advantage, for the improvement of land necessarily changes the amount of water drained and the speed of its flow. The law, however, does not so limit the rights of landowners.

In an early case, the court held that in the interest of GOOD HUSBANDRY, landowners could drain their ponds or collect surface water that would naturally be held in pools and hasten its flow by digging artificial DITCHES.⁴ But they could do so only if the water was discharged on lower land at the place where it would have flowed if the ponds or pools had been filled with dirt and the water forced out into natural channels of drainage.

All lands lying within a natural BASIN, therefore, may be drained into a watercourse—whether a stream or a mere depression—that drains this basin, and the owners of lower lands cannot object to this increased flow. The water can be carried by artificial ditches or by tile lines,⁵ but either must drain only the natural basin,⁶ and the water must enter the lower land where it would have in a state of nature.⁷ The courts have also held that the substitution of tile for surface drainage does not amount to an abandonment of natural drainage rights on the part of the owner.⁸

2 | In one court case, the natural course of drainage through land that drained onto the right-of-way of a railroad was an

"oxbow loop."⁹ When it rained, the water entered through a rocky gorge and deposited sand and debris on a farmer's land at the end of a long meander. The landowner proposed cutting a ditch straight through the loop and discharging the water on the railroad's right-of-way at the same point where the loop had discharged the water. The effect of the shortcut was to hasten greatly the speed of the flow against the railroad embankment and to cast sand and debris on it. The Illinois Supreme Court held that the landowner had a right to improve drainage by straightening the "oxbow" in these circumstances. But if the flow is increased unreasonably by changes unrelated to good husbandry, the owner of the higher ground may be liable for damage to lower land.¹⁰

A landowner may drain surface waters into watercourses.

Owners of higher ground can drain their land within a natural basin into a natural watercourse flowing through this land. As a practical matter, their right to drain into a stream is not often questioned, because draining into a creek or stream with ample banks does no actual harm. But even if such drainage does damage to lower ground, owners of higher ground have a legal right to drain into the stream so long as they do not cut through a natural divide but simply hasten the flow of water from the basin into the creek.

According to this rule, overflow waters from a creek or small stream are surface waters; therefore, owners of lower land are bound to receive them. Furthermore, owners of a stream bank have the right to improve it,¹¹ so long as the improvements do not impair drainage.

Urban landowners cannot increase drainage flows unreasonably. As the emphasis in Illinois shifted from agricultural to urban development, the good-husbandry doctrine was applied to situations in which land was not to be used for agricultural development. Unfortunately, this nineteenth-century doctrine was not easily adapted to urban applications. In response to this defect, in 1974 the Illinois Supreme Court adopted a limitation for REASONABLE USE, which was the first significant modification of Illinois natural drainage law since the nineteenth century.

In the case of *Templeton v. Huss*, the defendants owned the dominant estate, which they subdivided and developed.¹² The plaintiff owned the servient estate, a parcel of farmland. Recognizing that natural drainage could be substantially altered by urban development, the court held that the developer of the subdivision was liable for damages to the lower land if the houses and streets interfered so much with natural seepage that the amount and velocity of water running off the developer's land were *unreasonably* increased.

Although this case involved a drainage problem created by urbanization, the court's reasoning could easily be applied to future controversies over rural drainage: increased flow has to be consistent with the policy of reasonableness of use, which led initially to the good-husbandry exception.¹³

However, the criteria of the good-husbandry exception still appear to be applicable in agricultural situations.¹⁴ Courts have not expressly indicated that the *Templeton* case altered the good-husbandry exception, and if it has not, all the prior good-husbandry case law still applies. The importance of this interpretation is that in a rural setting, diversion from another watershed or discharge other than at the point of natural drainage may be essential for a servient landowner to recover damages or obtain other relief.

A landowner has no right to obstruct the flow of surface water. The owner of lower land obviously has no right to build a dam, levee, or other artificial structure that will interfere with the drainage of higher land, according to the CIVIL LAW as it is applied in Illinois. An amendment to the drainage code provides that willful and intentional interference by an owner of lower land is considered a petty offense and is subject to a fine.¹⁵ The construction of artificial impoundments or the temporary interruption of the flow of water by such impoundments is permitted.¹⁶ But the owner of higher land cannot compel the owner of lower ground to remove natural obstructions, such as shrubs, weeds, brushwood, cornstalks, or other crop residues, that may accumulate and impair natural drainage. However, in some circumstances the owner of the higher land has the right to enter the servient tract to make reasonable repairs and clean out

the watercourse.¹⁷ Before resorting to such self-help, the landowner should seek legal counsel.

Easements of drainage or of obstruction. When landowners are harmed by other owners and fail to enforce their rights, the harmful practices may themselves become rights, known as easements. An EASEMENT is an acquired right to cross or to use another's property. For example, if owners of higher ground fail to take action when owners of lower land dam or obstruct the flow of surface water, the owners of the lower ground may acquire a right to maintain the dam or obstruction by what is known as PRESCRIPTION or PRESCRIPTIVE USE. The period of use recognized in Illinois is 20 years.¹⁸ The owners of lower land may also acquire the right to have no surface water drain on their land from higher ground when the water has been diverted from the lower ground for the prescriptive period.

By this same process, owners of higher ground may acquire the right to change the place where their surface water enters lower ground or to maintain other artificial conditions not permitted under the rules of natural drainage.¹⁹

Whether an owner has acquired such a right is a difficult question. Any right to drainage so acquired may be less desirable than drainage through a natural channel. In theory, those who hold an easement are strictly limited to the benefits they had while they were acquiring the easement, whereas drainage through a natural depression or channel may be materially improved within interpretations placed on the civil-law rule by Illinois courts.

Drainage easements cannot be acquired against the public; for example, they cannot be acquired against a highway or school district.²⁰

Summary of the rules of natural drainage. Under Illinois law, private landowners have certain rights to improve the drainage on their land. They can

- widen, deepen, and clean natural depressions that carry their surface water;

- straighten out channels on their own property and accelerate the movement of surface water so long as they do not change the natural point of entry on lower land or unreasonably increase the flow onto servient tenements;
- drain ponds or standing water in the direction of their overflow;
- fill up ponds or low places where water may stand, and force water out into natural drainage channels;
- tile their property to expedite the flow of water so long as they do not unreasonably increase the flow, change the point of entry on lower land, bring in water from another watershed, or connect their tile to the tile of other owners without consent;
- expedite the flow of surface waters through natural lines of drainage by either open or closed DRAINS into a water-course or stream; and
- construct grass waterways, check dams, terraces, or other soil-conservation structures, so long as their drainage waters still come within the rules explained earlier and in the discussion of the statutory enlargement of the rules of natural drainage on pages 7 to 12.

Public highway authorities have the same rights and duties as private owners. They may, in addition, change the natural drainage when the change is necessary and in the public interest and when compensation is made for any taken or damaged property.²¹

Because of the effect on surrounding lands, landowners must not

- dam or obstruct a natural channel so that the escape of surface water from higher land is retarded or so that the channel is shifted;
- divert water to lands that do not naturally receive this drainage;
- change the point of entry of surface water on lower land;
- bring in water from another watershed that would not have flowed across lower land in a state of nature;

- pollute any waters that pass from their land through the property of others—whether surface or underground waters, streams, or diffused waters;
- connect their own tile with another owner's tile lines or with highway tile lines without consent;
- dam up or impound large bodies of water that escape and cause serious damage to lower lands owned by others, even though such waters may escape through natural channels; or
- accelerate the flow of water unreasonably, or with malicious intent to the material damage of lower land owned by others, even though the flow is accelerated through natural channels.



Installing drainage tile. Drainage tile is used extensively in central Illinois to remove excess water from farmland.

Statutory Enlargement of Rules of Natural Drainage

Right to extend a tile drain across the land of others.

Besides codifying the rules of natural drainage, the Illinois Drainage Code provides that owners may extend their tile drains across the land of others when this extension is necessary to perfect their drainage and when it meets certain conditions imposed by law.²² It also sets up the court procedure for securing this drainage.²³

The procedure is predicated on the assumption that the following conditions have been met.

- Other owners have refused consent.
- Owners seeking to extend their drainage will do so at their own expense.
- The extension is needed for a proper outlet.
- The water carried by the drain will empty into a natural watercourse, highway ditch, or other outlet that the owner has a right to use.
- The highway commissioners have consented if a highway drain is to be used.
- The constructed extension will be an ample and properly made covered drain.
- Damages incurred by owners across whose property the extension is constructed are paid.
- A bond with approved security, covering costs and damages, is filed.
- A plat showing the course of the proposed construction and where it will discharge is filed.

A landowner will need to retain legal counsel to initiate the court procedure. If the circuit court finds for the plaintiff—the owner seeking to improve drainage—and if all conditions in the law are met, the owner can proceed to construct the drain. This owner may abandon the construction of the drain even after a favorable judgment but must pay the costs of the trial. If construction is abandoned, suit for the same purpose cannot be brought until five years after the date of judgment.

Owners who build such a drain and their successors in title must keep the drain in good repair so that it will not injure the property through which it passes. To meet this obligation, the owners may enter the lands where the drains are located at any time, but the law provides triple damages for willful harm to servient lands,²⁴ for example, intentionally driving on rows of corn rather than between them to get to a repair site.

Drains constructed by mutual license or agreement. The second early law enlarging a landowner's drainage rights legalized drains constructed by mutual license, consent, or agreement. Because each drain must be a **MUTUAL DRAIN** constructed for the mutual benefit of all the lands affected by it (Figure 2), the **CODE** specifies a ditch, covered drain, or levee has been constructed by mutual license, consent, or agreement, either separately or jointly, by the owners of adjoining lands when it makes

a continuous line across the lands of such owners, or when the owner of adjoining land is permitted to connect a ditch, covered drain or levee with another already so constructed, or when the owner of lower land connects a ditch or covered drain to a ditch or covered drain constructed by the owner or owners of upperlands, or when the owner of land protected by a levee has contributed to the cost of the construction, enlargement or reconstruction of a levee upon other land.²⁵

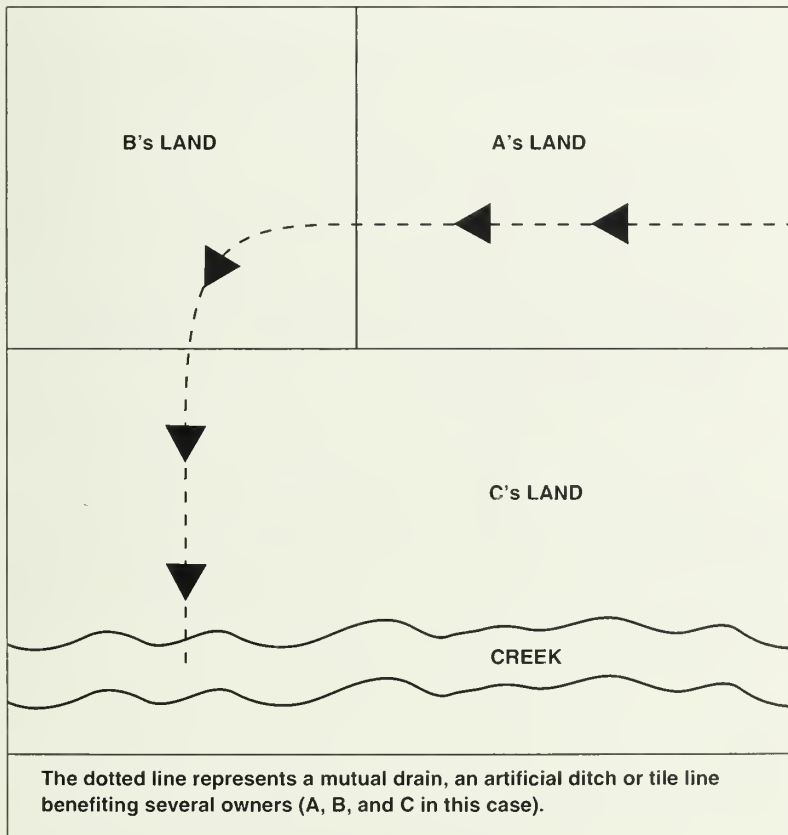


Figure 2. Mutual drain.

A mutual drain also arises when a single tract benefited by a ditch or covered drain is divided into two or more tracts.

The courts interpreting these provisions have added the following rules.

- This act has no relation to ditches authorized by DRAINAGE DISTRICTS (see pages 14 to 23).²⁶
- A written document is not essential for proving consent or agreement.²⁷
- Licenses revoked before this act took effect will not be revived by it, but what constitutes a revocation is not always clear.²⁸
- The intent of the act is to enlarge the natural rights of drainage between adjoining landowners and to protect the drains involved.²⁹
- Highways and highway commissioners are included in the act in the same way as are landowners.³⁰
- Owners have a right to maintain a mutual DRAINAGE SYSTEM as it was originally established.³¹
- Drains that come under this act create a perpetual easement on the premises involved.³²
- The act applies to existing and future drains that meet the criteria for mutuality, agreement, or consent.³³
- The rules of natural drainage are not affected except insofar as the mutual drain itself enlarges or alters the rights of the owners involved.³⁴

Three rules are important to mutual drains: one party to the drain cannot legally authorize connection by an outside owner unless all parties to the drain consent;³⁵ none of the interested parties can close a drain or interfere with the flow of water through it without the consent of all parties;³⁶ and an interested party may, at his or her own expense, enter the lands of others to repair the drain.³⁷

One question frequently asked is whether one or more parties to a mutual drainage system may connect additional lateral tiles on their land to it and thus increase the flow through the system. There is apparently no court case

specifically addressing this question, but the court's decision in the case of *Mackey v. Wrench* may be helpful even though that case addressed a different question.³⁸

Interpreting the mutual drainage sections of the code, the court stated:

Under these sections the owners of lands who have established and constructed a system of drainage for their mutual benefit possess a right to have such system of drainage maintained as established.

[An owner] may have the right under the doctrine announced in the case of *Peck v. Herrington* to improve and drain his own field in the course of good husbandry, even if by doing so he increases the flow of water upon his neighbor's land in a natural waterway or depression, but he has no right in doing so to disturb in any way the flow of waters which would pass off his premises through an outlet provided by a mutual system of drainage.³⁹

This language appears to preclude increasing the flow through such a system, as well as directing the flow away from the system, particularly if the increase is beyond the capacity of the present system.

If a member of a mutual drainage system wants to add lateral connections to the system, that member should secure consent from the other members. An agreement providing for the nature of and the responsibilities for the improvements should be reached in writing. Legal counsel should be consulted in the drafting of any such agreement. Any such agreement should also be recorded with the Recorder of Deeds.

Appropriate action can be taken to enforce these rules.

Court action can be maintained to compel a disconnection or the closing of the unlawful connection, and damages can be collected. A court INJUNCTION can be sought to remove the obstruction or to prevent interference when landowners enter the lands of others in order to make repairs at their own expense.

In the absence of an agreement for maintenance, an owner in a mutual drainage system may either petition for the organi-

zation of a district by USER (see page 18) or pay for the work. The mutual agreement, however, may include upkeep and maintenance responsibilities, or it may be that such a right has accrued by prescriptive use. Only the particular facts in each case determine if either condition exists.

Summary of statutory enlargements. The statutory enlargements of the civil-law rules of natural drainage may permit landowners to extend a tile drain across the property of others when the extension is necessary to secure a proper outlet if they follow the procedure and meet the conditions outlined in the statute; to connect to a drain along the highway with the consent of the highway commissioners; and to prevent owners of lower ground from interfering with the flow of water through a mutual drain, or from destroying or impairing such drains.

In addition to these specific statutory enlargements of the civil-law rules, an owner may create rights by contract or by prescriptive use. But in spite of enlargement by court interpretation, statutes, and contracts between owners, and the acquisition of rights by prescriptive use, thousands of Illinois landowners would have remained comparatively helpless in securing adequate drainage or flood control had not comprehensive drainage laws been adopted by the legislature providing for establishment of drainage districts.

Before making decisions about drainage, however, landowners should also be aware of the significant effects of the wetlands provisions of federal law. These provisions are discussed in Part III of this circular.

Notes

¹This drainage rule, known as the civil-law principle of natural drainage, applies to all Illinois farmland, regardless of whether or not it is in a drainage district. Iowa and Kentucky, like Illinois, base their drainage laws on the civil law, but Missouri, Wisconsin, and Indiana follow another legal concept known as the common-enemy rule. Theoretically, under the common-enemy rule, water is regarded as a common enemy, and landowners are given unrestricted legal rights to deal with surface water coming onto their land. Actually, the courts that follow this concept have developed limitations and exceptions to the rule to alleviate otherwise unjust results.

²Gormley v. Sanford, 52 Ill. 158 (1869).

- ³H.P. Farnham, *The Law of Waters and Water Rights* (1904).
- ⁴Peck v. Herrington, 109 Ill. 611 (1884).
- ⁵Counties with populations over 250,000 may require that a person installing drain tile record a diagram showing the location, size, and depth of the tile with the County Recorder of Deeds. 70 Ill. Comp. Stat. 605/2-13 (1996).
- ⁶Dayton v. Rutherford, 128 Ill. 271, 21 N.E. 198 (1889).
- ⁷Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906).
- ⁸Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893).
- ⁹Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906).
- ¹⁰Templeton v. Huss, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974).
- ¹¹Lambert v. Alcorn, 144 Ill. 213, 33 N.E. 53 (1893).
- ¹²Templeton v. Huss, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974).
- ¹³*Id.* at 141, 311 N.E. 2d at 146.
- ¹⁴*See* Callahan v. Rickey, 93 Ill. App. 3d 916, 418 N.E. 2d 167 (1981).
- ¹⁵70 Ill. Comp. Stat. 605/2-12 (1996).
- ¹⁶*Id.*
- ¹⁷Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
- ¹⁸735 Ill. Comp. Stat. 5/13-101 (1996).
- ¹⁹Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E. 2d 479 (1956).
- ²⁰Clare v. Bell, 378 Ill. 128, 37 N.E. 2d 812 (1941).
- ²¹Baughman v. Heinzelman, 180 Ill. 251, 54 N.E. 313 (1899).
- ²²The codification section reads: "Land may be drained in the general course of natural drainage by either open or covered drains. When such a drain is entirely upon the land of the owner constructing the drain, he [or she] shall not be liable in damages therefor." 70 Ill. Comp. Stat. 605/2-1 (1996).
- ²³70 Ill. Comp. Stat. 605/2-2 to 2-7 (1996).
- ²⁴70 Ill. Comp. Stat. 605/2-6 (1996).
- ²⁵70 Ill. Comp. Stat. 605/2-8 (1996).
- ²⁶Snyder v. Baker, 221 Ill. 608, 77 N.E. 1117 (1906).
- ²⁷Dorman v. Droll, 215 Ill. 262, 74 N.E. 152 (1905).
- ²⁸McIntyre v. Harty, 236 Ill. 629, 86 N.E. 581 (1909).
- ²⁹Cox v. Deverick, 272 Ill. 46, 111 N.E. 560 (1916).
- ³⁰Dunn v. Youmans, 224 Ill. 34, 79 N.E. 321 (1906).
- ³¹Mackey v. Wrench, 134 Ill. App. 587 (1907).
- ³²Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
- ³³McIntyre v. Harty, 236 Ill. 629, 86 N.E. 581 (1909).
- ³⁴Knudson v. Neal, 320 Ill. 136, 150 N.E. 626 (1926).
- ³⁵70 Ill. Comp. Stat. 605/2-9 (1996).
- ³⁶70 Ill. Comp. Stat. 605/2-10 (1996).
- ³⁷70 Ill. Comp. Stat. 605/2-11 (1996).
- ³⁸Mackey v. Wrench, 134 Ill. App. 587 (1907).
- ³⁹*Id.* at 590.

■ Part II

Illinois Laws on Drainage Districts

Natural drainage rules do not adequately meet the needs of landowners in many parts of the state—particularly in the flat prairie areas and in river bottoms, where both drainage and flood protection are needed.

To cover the inadequacies of the natural drainage rules and to give landowners a means of securing proper drainage, the legislature in 1879 passed two laws, the Levee Act and the Farm Drainage Act. These laws provided for drainage districts based on a system of assessments that permitted the districts to include only lands benefited. This principle was not changed by the drainage code that went into effect on January 1, 1956.

The courts hold that if landowners have adequate drainage under natural drainage rules, they do not receive the benefits of a drainage district, and their land cannot be included in a drainage district against their wishes.¹ In other words, before a drainage district can get jurisdiction over a tract of land, it must appear that the owners of this land have imperfect natural drainage. The mere fact that the ditches of a drainage district carry off water that originates on this land does not mean, in a legal sense, that the owners are necessarily benefited by the drainage district. Land may not be included in a drainage district nor be assessed by the district against the owners' will unless it can be shown that the property will be materially benefited by the district systems.

The primary purpose of the drainage code is to provide landowners with a legal organization that can be used to force uncooperative owners into the district and to secure adequate drainage or flood protection for the lands lying within it. Landowners within the district must pay assessments and submit to the exercise of EMINENT DOMAIN and certain other powers of the district if their lands will be benefited. At one time, Illinois contained over 1,500 drainage

districts, comprising a total of 5,454,000 acres.² Many of these districts have become inactive over the years. To activate a district so that repairs or new improvements can be constructed, new drainage commissioners must be appointed or elected. Landowners wishing to reactivate a drainage district should seek the assistance of an attorney in the general geographical area. This attorney should be knowledgeable about drainage law.

As a result of court interpretation of the constitutional provision on drainage,³ important principles have been established that influence the organization and operation of all drainage districts. These principles must be kept in mind throughout succeeding sections dealing with the details of the organization and operation of drainage districts.

- Assessments can be levied only against benefited land.
- Assessments on land cannot exceed the benefits that the land will receive.⁴
- Assessments are not limited to land alone but may be levied against improvements, providing that there are benefits.⁵
- "Benefits"—the estimated value of the proposed drainage works to a particular property—are not limited to "agricultural or sanitary" benefits, but may include other kinds, such as those occurring to a railroad or manufacturing concern; therefore, assessments may be levied against such property.⁶
- Landowners are entitled to a court hearing on the question of benefits before they can be compelled to pay drainage assessments.⁷
- Drainage districts are public corporations charged with specific governmental functions and, if necessary, may acquire rights in land by instituting eminent domain proceedings and paying just compensation to the owners.⁸
- Drainage districts are dependent solely upon statute, and the statutory requirements must be satisfied to make their organization legal.⁹

Organization of Districts

The primary method for organizing a drainage district is a petition signed either by 20 percent of the adults owning more than one-fourth of the land in the proposed district or by more than 25 percent of the adults owning a majority of the land in the proposed district.¹⁰ The petition is filed in the circuit court of the county in which most of the proposed district lies.¹¹ A petition must include

- the name of the proposed district;
- a statement showing the necessity of the district;
- a description of the proposed work;
- a general description of the lands that will be affected and the names of the owners;
- a description of the boundaries and approximate number of acres; and
- a request for the organization of the district and appointment of commissioners.¹²

Provision is made for giving a notice and holding a court hearing on the petition.¹³ A hearing must occur so that anyone affected may appear and contest the necessity or utility of all or any part of the proposed work.¹⁴ After the hearing, the court determines whether the petition has been signed by enough people owning the prescribed amount of land and whether the petition meets other legal requirements.¹⁵

The law also provides for an alternate method of organization. Proceedings are instituted upon a petition signed by at least 10 percent of the adults who own at least one-fifth of the land in the proposed district. After the notice and hearing on the petition, a referendum is held. If a majority of those voting on the question vote in favor of the organization of the proposed district, the court shall proceed with organization of the district.¹⁶

Petitions must be carefully prepared. Failure to state correctly and logically what is needed, the omission of material requirements, the inclusion of territory already in another district, and other irregularities will render a petition

ineffective. Legal assistance in preparation of the petition is indispensable.

If the court approves the petition, the appropriate authority appoints three temporary commissioners, who must subscribe to and file an oath.¹⁷ One commissioner must be elected chair. Two or more commissioners constitute a QUORUM.

The specific duties of the temporary commissioners include examining the land with regard to the feasibility of the project and the costs and benefits involved. A REGISTERED PROFESSIONAL ENGINEER must be employed for this task unless the court excuses the use of one. The commissioners must also prepare a report on their findings and file it with the court. The law also provides for a hearing on the report.¹⁸

After the hearing, the court may

- confirm the report and enter the prescribed order declaring the district organized;
- modify the report and confirm it;
- order the commissioners to review and modify the report before it is confirmed; or
- find that the district should not be organized because the benefits do not exceed the costs.¹⁹

Organization of Outlet, Mutual, and User Districts

The organization of outlet districts follows usual procedures. Outlet districts must benefit land already in two or more drainage districts as well as land not in such districts. Their purpose is to deepen and widen the natural outlets for collected waters, not to construct original drainage or levee works.²⁰

The organization of mutual drainage districts. Once all the landowners in an area have signed a mutual agreement, a notary public or anyone authorized by law to administer oaths has acknowledged the agreement, and it has been placed in the drainage record, a mutual drainage district is formed.²¹

The mutual agreement may cover these or other points: the location and character of work to be done, the adjustment of damage, the amount of assessment to be levied, the assessment against each tract, how the work shall be done, and the designation of the original commissioners.

When no contract for construction is awarded to a mutual district or when the court feels it was organized to prevent the inclusion of its lands in a district by petition, the lands in the mutual district may be included in a district by petition.

The organization of user districts. When two or more property owners have connecting artificial drains that were established by a mutual agreement between or among the owners, or where the property is divided among different owners after the drain was constructed, and when the present owners cannot agree on the repair or maintenance of the system, any one of these owners may petition the court to have the lands thus connected organized as a USER DRAINAGE DISTRICT.²² If the facts support the petition, the court proceeds with organization as in any other district.

The drainage code also includes provisions for abandoning work and dissolving districts,²³ consolidating districts,²⁴ annexing and detaching lands,²⁵ and organizing subdistricts.²⁶

Important Rules Laid Down by the Courts

Many controversies have arisen over the organization of drainage districts. Illinois courts have, as a result, developed certain rules. Among the more important ones are these.

- Signatures may be withdrawn or added to a petition at any time before the court takes action on the petition, but after action has been taken, a signature may be withdrawn only with the consent of the majority of the other petitioners unless it can be shown that the signature was secured through fraud or misrepresentation.²⁷
- The preliminary order of the court must contain a definite statement of the findings that the court made on the questions it must consider.²⁸
- An order is ineffective if the court does not acquire jurisdiction by following the statutory requirements in

detail or if material errors or omissions in the petition remain uncorrected.²⁹

- A drainage district cannot be organized to correspond with the boundaries of a township or other political unit except in the unlikely event that this unit constitutes a natural watershed and contains lands that can be efficiently connected by a continuous line of ditches or drains.³⁰

Powers and Duties of Commissioners

Once a district is organized, the temporary commissioners become permanent commissioners until the first Tuesday in September following its organization. Then three commissioners are appointed by the appropriate authority to handle the affairs of the drainage district.³¹ The commissioners serve three-year staggered terms. Provision is made for allowing a majority of the adults owning a majority of the land area to designate by petition who shall be appointed.³² A procedure is included for dispensing with two of the appointed commissioners after the initial work is completed.³³ In some drainage districts, commissioners are elected rather than appointed. The drainage code also provides that certain districts can change from the appointment to the election of commissioners and vice versa. As a general rule, one must own land in the district to be appointed or elected; however, this requirement can be waived in certain circumstances.

Commissioners generally have the power and duty to do all that is necessary to accomplish the purposes of the law. These powers and duties are

- to go upon the land, employ necessary assistance, and adopt a plan or system of drainage;
- to obtain the necessary lands and right-of-way by agreement or, if necessary, by eminent-domain proceedings;
- in the corporate name of the district, to enter into contracts, sue and be sued, plead and be impleaded, and to do all that may be necessary to accomplish the purposes of this act;
- to compromise suits and controversies and employ necessary agents, attorneys, and engineers;

Drainage ditch.
Occasional
cleaning of
drainage ditches
is an important
maintenance
responsibility of
drainage
commissioners.



- to carry out specific provisions of the law relative to making various types of assessments, employing a treasurer, employing other assistance, annexing lands, borrowing funds, enforcing payment of assessments, and consolidating and dissolving districts;

- to let contracts for the surveying, laying, constructing, repairing, altering, enlarging, cleaning, protecting, and maintaining of any drain, ditch, levee, or other work (but commissioners are forbidden from having any interest in such contracts);
- to let contracts by bid if the work to be done is the construction of the principal work and the cost is more than \$5,000 (some exceptions are made for emergency repairs);³⁴
- to borrow money, without court authority, up to 90 percent of assessments unpaid at the time for the payment of any authorized debts or construction;
- to widen, straighten, deepen, or enlarge any ditch or watercourse, and to remove driftwood and rubbish whether the ditch is in, outside, or below the district;
- to cause railroad companies to construct, rebuild, or enlarge bridges or culverts when necessary;

- to make annual or more frequent reports as required by the court, including an annual financial report;
- to conduct meetings in the county or counties in which the district is located and to conduct an annual meeting in the county in which the district was organized;
- to use public highways for the purposes of work to be done;
- to make annual inspections of the improvements and works of the district and keep them in operation and repair;
- to sell or lease any land owned by the district;
- to own and operate necessary machinery and equipment;
- to construct access roads and level spoil banks;
- to abandon works no longer useful to the district;
- to contract with other public agencies, including the federal government; and
- to file a list of active commissioners with the clerk of the circuit court, and a map showing all boundaries and the location of all drainage improvements with the circuit clerk and the county clerk of the county in which the district is organized.



Balancing drainage and environmental considerations. This drainage ditch remains clear on one side. The trees that have been allowed to grow on the other side provide a habitat for wildlife.

In performing these duties and powers, the commissioners must use all practical means to protect the environment, including trees, fish, and wildlife habitats. Commissioners must avoid eroding land and polluting land, water, and air.³⁵

The appointing authority may for good cause remove any commissioner it appointed and may fill all vacancies. Also, the law provides for a penalty and removal from office of commissioners who refuse or neglect to discharge the duties imposed on them by law.

Also, when petitioned, either by a commissioner or by a landowner, the circuit court may determine the duty of the commissioners toward this landowner.³⁶

Drainage Record

Circuit clerks, who act as clerks of the districts in their counties, are required to keep for each of their districts a Drainage Record. It must contain the order organizing the district and orders regarding the levy of assessments, performance of work, or duties of commissioners. It should also contain the maps, plats, and plans of the district; the list of active commissioners; and all assessment rolls, certificates of levy, reports, and other formal records of the district required to be recorded.³⁷

Owners' and Districts' Rights and Duties Concerning Ditches and Drains

As a result of statutes, decisions, and the application of common-law rules, an owner has the right to use the water in a drainage district ditch, fish or trap in it, take ice from it, cross it, and move implements along its banks so long as the owner does not impair the functioning of the ditch or break down its banks.³⁸ An owner may also connect with the drains of a district, providing the type of connection is approved by the commissioners.³⁹

A district has the right to enjoin—prohibit or restrain by court order—pollution of a ditch; to subject to the jurisdiction of the district the land of anyone who connects a drain or drains to the district's drains; to have criminal charges brought against any person who wrongfully or purposefully

"fills up, cuts, injures, destroys or in any manner impairs the usefulness of any drain." If the injury is to a levee and causes flooding, the person shall be deemed guilty of a Class 3 felony; and besides being fined, this person may be imprisoned for a term of two to five years. The commissioners can also recover damages to their works from this person.⁴⁰

Illinois courts have decided that a district is *not* required to fence its ditches or rights-of-way. Neither is it required to construct farm bridges across its ditches, but the cost of a bridge may be considered in determining damages to particular property.⁴¹ Older districts, however, may have some bridge maintenance responsibility.

Before a farmer and a drainage district decide to make drainage improvements, they should also consider the effects these improvements will have on the farmer's participation in USDA programs. The wetlands provisions of federal law are discussed in the next part of this circular.

Notes

¹Commissioners of Sangamon and Drummer Drainage District v. Houston, 284 Ill. 406, 120 N.E. 253 (1918).

²Survey by the Illinois Tax Commission.

³In 1878, the first amendment was made in the 1870 constitution to provide that districts could levy special assessments on property benefited through the exercise of its power to "construct and maintain levees, drains and ditches, and keep in repair all drains, ditches and levees heretofore constructed under the laws of this state." As a result, districts were able to finance their operations. No similar provision is included in the 1970 Illinois constitution. Apparently, the drafters thought that the new constitutional provision granting the state the power to raise revenue in any manner unless otherwise limited was adequate, when read in conjunction with the statutory provisions giving drainage districts the power to levy assessments.

⁴Sny Island Levee Drainage District v. Meyer, 27 Ill. 2d 530, 190 N.E. 2d 356 (1963).

⁵Marshall v. Commissioners of Upper Cache Drainage District, 313 Ill. 11, 144 N.E. 3213 (1924).

⁶Illinois Cent. R. Co. v. Commissioners of East Lake Fork Drainage District, 129 Ill. 417, 21 N.E. 925 (1889).

⁷People *ex rel.* Wheeler v. Harvey, 396 Ill. 600, 72 N.E. 2d 345 (1947).

⁸Hunt Drainage District v. Harness, 317 Ill. 292, 148 N.E. 44 (1925).

⁹Bissell v. Edwards River Drainage District, 259 Ill. 594, 102 N.E. 990 (1913).

¹⁰70 Ill. Comp. Stat. 605/3-3 (1996).

¹¹*Ibid.*

¹²70 Ill. Comp. Stat. 605/3-3 (1996).

¹³70 Ill. Comp. Stat. 605/3-4 to 3-6 (1996).

¹⁴70 Ill. Comp. Stat. 605/3-7 (1996).

¹⁵70 Ill. Comp. Stat. 605/3-8 (1996).

¹⁶70 Ill. Comp. Stat. 605/3-26 (1996).

¹⁷70 Ill. Comp. Stat. 605/3-9 to 3-10 (1996).

¹⁸70 Ill. Comp. Stat. 605/3-12 to 3-20 (1996).

¹⁹70 Ill. Comp. Stat. 605/3-21 to 3-23 (1996).

²⁰70 Ill. Comp. Stat. 605/3-28 to 3-30 (1996).

²¹70 Ill. Comp. Stat. 605/3-31 (1996).

²²70 Ill. Comp. Stat. 605/3-27 (1996).

²³70 Ill. Comp. Stat. 605/10-1 to 10-11 (1996).

²⁴70 Ill. Comp. Stat. 605/9-1 to 9-9 (1996).

²⁵70 Ill. Comp. Stat. 605/8-1 to 8-22 (1996).

²⁶70 Ill. Comp. Stat. 605/7-1 to 7-12 (1996).

²⁷*Snedeker v. Drainage District*, 124 Ill. App. 380, 98 N.E. 1096 (1907).

²⁸*Maulding v. Skillet Fork River Outlet Union Drainage District*, 313 Ill. 216, 145 N.E. 227 (1924).

²⁹*Okaw Valley Outlet Drainage District v. Springman*, 345 Ill. 400, 178 N.E. 64 (1931).

³⁰*Klinger v. People ex rel. Conkle*, 130 Ill. 509, 22 N.E. 600 (1889).

³¹70 Ill. Comp. Stat. 605/4-1 (1996).

³²70 Ill. Comp. Stat. 605/4-2 (1996).

³³70 Ill. Comp. Stat. 605/4-9 (1996).

³⁴*See generally* 70 Ill. Comp. Stat. 605/6-1 (1996) et seq.

³⁵70 Ill. Comp. Stat. 605/4-15.1 (1996).

³⁶70 Ill. Comp. Stat. 605/4-26 et seq. (1996).

³⁷70 Ill. Comp. Stat. 605/4-35 (1996).

³⁸70 Ill. Comp. Stat. 605/12-3 (1996).

³⁹70 Ill. Comp. Stat. 605/12-1 (1996).

⁴⁰70 Ill. Comp. Stat. 605/12-7 (1996). *See* 730 Ill. Comp. Stat. 5/5-8-1(1996) for the nature of criminal penalties.

⁴¹70 Ill. Comp. Stat. 605/12-5 (1996).

■ Part III

Drainage and the Regulation of Wetlands

Note: The exact definition of "wetland" continues to be refined through administrative rulemaking. The reader should be aware that further changes could still take place.

Well-drained agricultural lands serve society by providing a rich natural resource for the production of food. But wetlands also serve society through surface and subsurface water storage, nutrient cycling, particulate removal, maintenance of plant and animal communities, water filtration or purification, and groundwater recharge. The conflict between these competing land uses has resulted in legislation intended to protect the relatively few remaining wetlands in the United States. One law makes the preservation of existing wetlands an eligibility requirement for continued participation in beneficial USDA programs. Another set of laws deals with permit requirements for construction in streams or floodways (including permit requirements for some drainage improvement activities). Drainage improvements otherwise allowed under the Illinois Drainage Code are discouraged or prohibited by these additional laws protecting wetlands.

The Wetlands Provisions of the Food Security Act of 1985, as Amended

To remain eligible for USDA program benefits, farmers must comply with the wetlands provisions of the Food Security Act of 1985,¹ as amended by the Food, Agriculture, Conservation, and Trade Act of 1990 and the Federal Agriculture Improvement and Reform Act of 1996. Under these provisions, any person who clears, drains, dredges, levels, or alters a wetland after December 23, 1985, to produce an agricultural commodity shall be ineligible for USDA program benefits on all land owned or operated in an amount proportionate to the severity of the violation.² Farmers who participate in USDA programs must

- know where and what kinds of wetlands are on their farmland;
- know what management options exist for these wetlands in order to comply with the wetlands provisions of the act; and
- contact the local Natural Resources Conservation Service (NRCS) office if they plan to alter or improve drainage on their wetlands.

The wetlands provisions of the act are intended to help protect U.S. wetlands.³ Generally, a wetland is an area of wet soil that will support a prevalence of water-loving plants.⁴ Wetlands are usually uncropped areas with cattails, willows, or other plants that grow well in wet soils or water. A wetland may also be a wet area in a field where smartweed, yellow nutsedge, and similar plants grow.

Wetlands are some of the most productive and dynamic habitats in the world. The physical, chemical, and biological interactions within wetlands are often referred to as wetland functions. Similarly, the characteristics of wetlands that are beneficial to society are called wetland values. Some examples of wetland values include reduced damage from flooding, water quality improvement, and fish and wildlife habitat enhancement. It is important to maintain and restore wetland functions and values because wetlands contribute to the overall health of the environment.⁵

The wetland provisions of the act are important to anyone who uses any program of the USDA administered by the Farm Service Agency (FSA), the Natural Resources Conservation Service (NRCS), or any other USDA agency.⁶

To remain eligible for these USDA programs, farmers must not alter or improve drainage on certain wetland areas to produce agricultural commodities.⁷ If a person alters or improves drainage on these wetlands, the wetlands become "converted wetlands."⁸ Converted wetland means a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated to make the land suitable for planting crops.⁹ Essentially, wetlands are considered converted if physical manipulation has altered natural wetland characteristics to

the point of making crop production possible. Many common practices, such as pushing back the edges of woods, squaring up fields, or clearing existing drainage paths may cause a wetland to be converted. Any person who produces agricultural commodities on a converted wetland may become ineligible for some USDA benefits.¹⁰

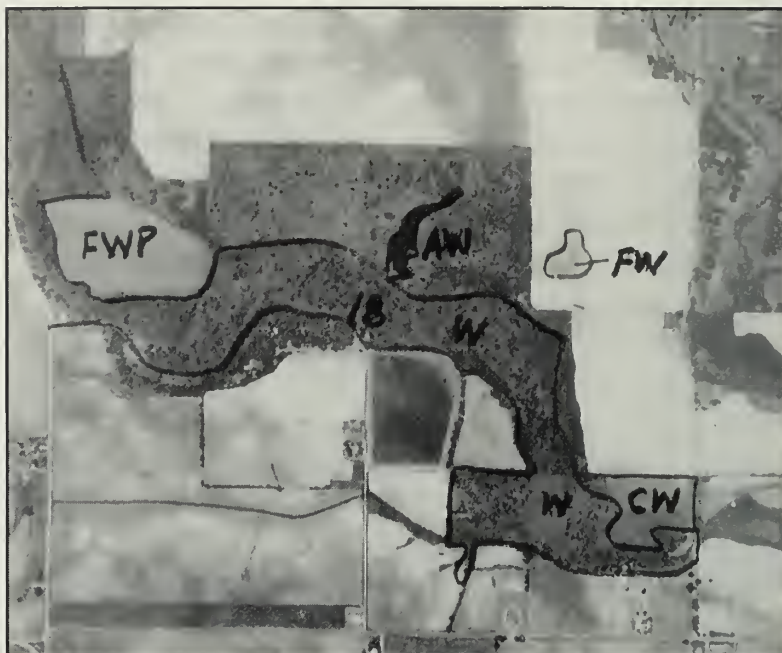
To avoid converting protected wetlands, farmers must be able to identify the types of wetlands on their land. These wetlands may not be obvious because affected farmland may not always look like a wetland. A wetland may be any size and need not look like a swamp. As a practical matter, a wetland consists of any poorly drained soil. The NRCS has conducted a wetland inventory to help farmers determine whether their farms have wet areas affected by the act's requirements.¹¹ The NRCS uses the federal wetland delineation methodology in use at the time of the determination.¹² Some tools used by NRCS in a wetland determination include published soil maps and the publications *Hydric Soils of the United States 1985* and *List of Plant Species that Occur in Wetlands*.¹³ Persons adversely affected by a wetland determination who believe that the determination was improperly applied have appeal rights.¹⁴

A goal of the wetland inventory is to determine the location of wetlands. Wetlands are marked on a base map, which is used by the NRCS to produce individual aerial maps for farmers with wet areas affected by the act. These maps show where and what kinds of wet areas remain on farmland (Figure 3).

The NRCS field offices in various counties distribute the maps along with other wetland information. The NRCS goal is to help farmers identify the wetlands on their farms and to help these farmers understand their management options regarding these areas so that they can comply with the act and remain eligible for USDA benefits.

Farmers who traditionally participate in USDA programs should have a wetland determination for their property. Upon request, a person may obtain certification of a wetland determination.¹⁵ The NRCS has identified several types of

Figure 3.
Aerial map
showing
different
wetlands on a
farm.



wetlands, including “prior converted” cropland, wetland, farmed wetland, converted wetland, farmed-wetland pasture, and artificial wetland.¹⁶ The NRCS has also specified management options for these wet areas.¹⁷

Prior Converted Cropland

These “PC” areas were cleared, drained, or filled and cropped before December 23, 1985, and have been maintained as cropland. Typically, much of Illinois cropland on poorly drained soil is drained and is “prior converted” cropland. PC cropland may be farmed and maintained or improved in any way so long as it continues to be used for agriculture. The 1996 Farm Bill revised the concept of abandonment. So long as land is used for agriculture and met prior converted cropland criteria on December 23, 1985, the designation remains in effect.¹⁸

Wetland

Marked “W” on the map, wetland, except when such term is a part of the term “converted wetland,” means land that

- has a predominance of hydric soils;

- is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- under normal circumstances supports a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.¹⁹

Farmed Wetland

Marked "FW" on the map, farmed wetland is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:

- is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); or
- if a pothole, playa, or pocosin, is ponded for seven or more consecutive days during the growing season in most years (50 percent chance or more), or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more).

The original drainage system may be maintained on most farmed wetlands. This means that tile may be repaired and ditches may be cleared so long as no added drainage capacity is achieved, provided wetland conditions have not returned to the area. USDA farm program participants must complete Form AD-1026 to indicate the proposed project.²⁰

Converted Wetland

Converted wetland, marked "CW" on the map, is a wetland that, as of December 23, 1985, had been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the

production of an agricultural commodity without further application of the manipulations described herein if

- such production would not have been possible but for such action; and
- before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland.²¹

Farmed-Wetland Pasture

Farmed-wetland pasture is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:

- is inundated or ponded for seven or more consecutive days during the growing season in most years (50 percent chance or more); or
- is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more).²²

Artificial Wetland

Artificial wetland—"AW" on the map—is an area that was formerly nonwetland but now meets wetland criteria due to human activities; for example,

- an artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water used primarily for livestock, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond; or
- wetland that is temporarily or incidentally created as a result of adjacent development activity.²³

Use and management of each type of wetland is linked to a farmer's eligibility for USDA benefits.

Farmers applying for these benefits must certify in writing on Form AD-1026 that they have not converted any wetlands after November 28, 1990, and they will not produce crops on converted wetlands during the crop year in which

they are seeking such benefits unless this production is exempt.²⁴ Farmers who have questions or disagree with the NRCS determination regarding a particular wet area on their land should contact their local NRCS field office.

Farmers may appeal the NRCS technical determination of wet areas on their land. In each case, they must explain in writing why they feel the NRCS did not properly apply the criteria for identifying wetlands. The district conservationist will then reevaluate the area based on evidence the farmer supplies and will change the determination if the NRCS misinterpreted the technical criteria in identifying a particular area.

If the district conservationist finds that the NRCS correctly identified the wet area, farmers may formally appeal the technical decision.²⁵ Farmers should seek legal counsel if they decide a formal appeal is necessary. The NRCS aims to resolve disputes informally at the local level whenever possible. Changes in the law itself should be dealt with through the political process. The 1990 and 1996 farm bills, for example, have modified many of the provisions of the 1985 act.

The 1996 Farm Bill changed Swampbuster provisions to give farmers greater flexibility in complying with wetland conservation requirements. Major changes include the following.

Mitigation. More options exist for mitigation. These options include restoration, enhancement, or creation activities that maintain a wetland's functions and values. Landowners who desire to convert or alter wetlands may enhance existing wetlands, restore former wetlands, or create new wetlands to offset functions and values that are lost from conversions or alterations.²⁶

Abandonment. A prior converted cropland will always remain so. A farmed wetland or farmed-wetland pasture may, when done so under an approved plan, revert to wetland status and be converted back to farm wetland or farmed-wetland pasture.²⁷

If the property is nonagricultural, it is still subject to wetland provisions under Section 404 of the Clean Water Act. This act is administered by the U.S. Army Corps of Engineers.

Permit Requirements for Construction in Streams or Floodways

Section 404 of the Federal Clean Water Act Amendments of 1977 established a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands.²⁸ Activities regulated under this program include water resource projects (such as dams and levees) and conversion of wetlands to farming and forestry. The U.S. Army Corps of Engineers and Environmental Protection Agency have key regulatory responsibilities under the Section 404 program. In essence, the Section 404 program requires that no discharge of dredged or fill material can be permitted if a practicable alternative exists that is less damaging to the aquatic environment or if the nation's waters would be significantly degraded. In other words, a permit application must show that the applicant has

- taken steps to avoid wetland impacts, where practicable;
- minimized potential impacts to wetlands; and
- provided compensation for any remaining, unavoidable impacts through activities to restore or create wetlands.

Regulated activities are controlled by a permit review process administered by the Corps. An individual permit is usually required for potentially significant impacts.²⁹ However, for most discharges that will have only minimal adverse effects, the Army Corps of Engineers often grants up-front general permits. Section 404(f) exempts some activities from regulation under Section 404—for example, maintenance (but not construction) of drainage ditches and minor drainage improvements.

Illinois statutes also require a permit from the Illinois Department of Natural Resources for construction by highway authorities, by drainage districts, or by individuals when such construction is located in any stream or floodway draining more than one square mile in an urban area or ten

square miles in a rural area. Specifically exempted from the rules are field tile systems, tile outlet structures, terraces, water and sediment control basins, grade stabilization structures, and grassed waterways that do not obstruct flows. In addition, most of the maintenance and repair of existing structures is excluded. The law applies to any person, corporation, unit of local government, or state agency.³⁰ The permit application includes the name of the applicant, the location of the site, a description of the project, a statement of the purpose of the construction, a list of potentially affected properties, and a description of the watershed containing the affected property.

The U.S. Army Corps of Engineers, the Illinois Department of Natural Resources, and the Illinois Environmental Protection Agency have developed a joint permit application form. Anyone proposing to construct or maintain a dam, levee, or similar structure, or otherwise alter the bed or banks of any stream, wetland, or floodway subject to state or federal jurisdiction should use the joint permit application form. Questions should be directed to the appropriate office of the Army Corps of Engineers, the Illinois Department of Natural Resources, or the Illinois Environmental Protection Agency. Jurisdiction for particular watersheds of Illinois is divided among numerous Army Corps of Engineers Districts: Chicago, Rock Island, St. Louis, Louisville, and Memphis.

Notes

¹16 U.S.C. § 3821 et seq. (Supp. 1997).

²16 U.S.C. § 3821 (Supp. 1997).

³See Federal Regulations on Highly Erodible Land and Wetland Conservation, 7 C.F.R. § 12.1(b)(4) (1997).

⁴16 U.S.C. § 3801(a)(18) (Supp. 1997).

⁵NRCS Fact Sheet, *Wetland Functions and Values, 1997* (available at <http://www.nhq.nrcs.usda.gov/OPA/FB96OPA/FuncFact.html>).

⁶See Interim Final Rule for Highly Erodible Land and Wetland Conservation, 7 C.F.R. Part 12, as published in the Federal Register, Vol. 61, No. 174, September 6, 1996.

⁷See 16 U.S.C. § 3821 (Supp. 1997).

⁸16 U.S.C. § 3801(a)(6)(A) (Supp. 1997).

⁹*Id.*

¹⁰There are exceptions to the wetland provisions. See 7 C.F.R. § 12.5(b) (1997). For example, no person will become ineligible for USDA benefits under the act by cropping

- prior converted cropland that meets the definition of a prior converted cropland as of the date of a wetland determination by NRCS;
- land that was determined by NRCS to be a farmed wetland or a farmed-wetland pasture and that meets certain technical criteria and documentation by the NRCS;
- an artificial wetland determined by NRCS;
- a wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation;
- a nontidal drainage or irrigation ditch excavated in nonwetlands;
- a wetland converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if such conversion was not the result of a scheme or device to avoid compliance with the act;
- a wetland where cropping is possible due to a natural condition, such as drought, and without action by the farmer that destroys a natural wetland characteristic; or
- a converted wetland if the NRCS determines that such action will only minimally affect the hydrological and biological aspect of the wetland.

Loans made before December 23, 1985, will also not be affected by the wetlands provisions. 7 C.F.R. § 12.4(f) (1997).

¹¹Information about the wetland inventory comes from the text of the slide presentation (NRCS—Champaign, Illinois). This information was also updated by the NRCS.

¹²7 C.F.R §12.6(c)(5) (1997).

¹³7 C.F.R §12.31. The publication *Hydric Soils of the United States 1985* was developed by the National Technical Committee for Hydric Soils and may be obtained by writing NRCS at U.S. Department of Agriculture, P.O. Box 2890, Washington, DC 20013. The publication *National List of Plant Species that Occur in Wetlands* may be obtained from the U.S. Fish and Wildlife Service at National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, St. Petersburg, FL 33702.

¹⁴See 7 C.F.R §12.12 (1997).

¹⁵See 7 C.F.R §12.2 (1997).

¹⁶NRCS Fact Sheets, 1997. These fact sheets are used by the NRCS to present information contained in the wetland provisions of the Food Security Act of 1985 and applicable federal regulations. All NRCS fact sheets are available on the USDA Internet site at <http://www.nhq.nrcs.usda.gov/> (click on "1996 Farm Bill").

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴7 C.F.R. § 12.7(a)(2) (1997). For exemptions, see 7 C.F.R. § 12.5(d), *supra*, n.11.

²⁵7 C.F.R. § 12.12 (1997).

²⁶See Interim Final Rule for Highly Erodible Land and Wetland Conservation, 7 C.F.R. Part 12, as published in the Federal Register, vol. 61, No. 174, September 6, 1996.

²⁷*Id.*

²⁸See U.S. Environmental Protection Agency, Section 404 of the Clean Water Act: An Overview (<http://www.epa.gov/OWOW/wetlands.wet10.html>).

²⁹See U.S. Army Corps of Engineers, Regulatory Program Applicant Information (<http://wetlands.usace.mil/APPLY-bro.html>).

³⁰615 Ill. Comp. Stat. 5/29a (1996).

■ Part IV

Illinois Soil Erosion and Sedimentation Control

Soil and Water Conservation District Guidelines for Erosion and Sediment Control

The intent of the Erosion and Sediment Control Program in Illinois is to apply conservation systems and practices to Illinois land to seek to reduce soil losses from erosion to acceptable levels.¹ On April 18, 1980, the Illinois Department of Agriculture adopted guidelines² for erosion and sediment control as mandated by the Illinois Soil and Water Conservation Districts Act.³ These guidelines phase in increasingly stringent soil-loss limits. Individual soil and water conservation districts have adopted similar guidelines, which must be at least as stringent as those of the state. The guidelines provide a mechanism for encouraging landowners and occupiers of land to reduce erosion. When erosion is reduced, drainage ditches and tile and other DRAINAGE STRUCTURES are less likely to be damaged by siltation.

Sediment clogging a culvert. Erosion can clog culverts, deposit silt in waterways, and otherwise hamper drainage systems. Good soil conservation practices help protect drainage systems.



The soil-loss guidelines are based upon the concept of "T-value": the average annual tons of soil loss per acre "a given soil may experience and still maintain its productivity over an extended period." For most Illinois soils, the T-value is between two and five tons of annual soil loss per acre. These soil losses are estimated with the UNIVERSAL SOIL LOSS EQUATION. The goal of the guidelines is "T by 2000," that is, to reduce soil loss from every acre to its T-value or less by the year 2000. The state guidelines call for reaching this goal according to the timetable in Table 1.⁴

Dateline	Soil Loss Goals	
	≤5 percent slope	>5 percent slope
	—————tons per acre per year—————	
January 1, 1983	4 to 20 (4 T or less)	4 to 20 (4 T or less)
January 1, 1988	1 to 5 (T or less)	2 to 10 (2 T or less)
January 1, 1994		1.5 to 7.5 (1.5 T or less)
January 1, 2000		1 to 5 (T or less)
(Note: Ranges are indicated because soil types differ.)		

Table 1. Illinois guidelines for achieving tolerable annual soil loss (T).

Some soil and water conservation districts may have adopted more stringent soil-loss limits or a more stringent timetable.

The guidelines anticipate that T-value will be attained by the adoption or installation of conservation tillage systems, grassed waterways, terraces, or the seeding of permanent vegetative cover. It is also anticipated that state cost-sharing monies will be available to landowners to help defray the costs of these practices or structures.

Enforcement of the Guidelines

Educational and financial incentives are used to obtain compliance with the guidelines, but any person who believes a serious problem with erosion and sediment exists

may file a COMPLAINT. A complaint is generally filed with the soil and water conservation district in which the problem land is located and should contain the following information:

1. the name and address of the person or persons filing the complaint;
2. the date the alleged violation was observed;
3. the location by legal description or metes and bounds of the land being damaged by sediment;
4. a description of the nature and extent of the damage being done;
5. the names and addresses of landowners and occupiers, if known, and the location by legal description or by metes and bounds of land believed to be the source of excessive sediment; and
6. The signature of the person or persons filing the complaint and the date filed.⁵

Upon receiving a complaint, the soil and water conservation district must notify the landowner involved; conduct an investigation; determine whether a violation of the guidelines exists; and, if it does, give the landowner or occupier a Notice of Violation. The soil and water conservation district must attempt to get the individual to comply with the guidelines, but if this attempt fails, the Illinois Soil and Water Conservation Districts Act does not provide for fines or other enforcement tools, except those that may exist under other legislation, such as the Illinois Environmental Protection Act and its water pollution rules and regulations.⁶

Although the current program lacks a vigorous enforcement mechanism, contacts by the soil and water conservation districts with individual landowners sometimes produce voluntary compliance. Similarly, if erosion from property owned by the highway authority is causing sedimentation problems for adjacent landowners, they might benefit from district contacts with the highway authority.

Notes

¹8 Ill. Admin. Code 650.10 (1994).

²Rules and Regulations Relating to the Soil and Water Conservation Districts Act, 4 Ill. Admin. Reg. 88 (May 2, 1980).

³70 Ill. Comp. Stat. 405/1 et seq. (1996).

⁴8 Ill. Admin. Code 650.30 (1994).

⁵8 Admin. Code 650.340 et seq. (1994).

⁶*Id.*

■ Glossary

Basin. A natural depression that holds water. Water cannot flow out of a basin without artificial aid.

Civil law. A written code of laws that originated in Rome and is now used in many countries. It is to be distinguished from English common law, which is based on statutes and court decisions. (Louisiana is the only state with predominantly civil law, but Illinois and some other states have adopted natural drainage rules like those in the civil law.)

Code. The product of codification, which is the rearrangement under one general title and in one place of all the laws on a particular subject.

Complaint. A written statement that is filed with a court and that asks for relief from some injustice described in the complaint. The filing of a complaint formally initiates a lawsuit.

Ditch. An artificially constructed open drain or a natural drain that has been artificially improved.

Dominant land or tenement. Property so situated that its owners have rights on adjacent property, such as a right-of-way or a right of natural drainage. The adjacent land is the servient land or tenement.

Drain. A ditch and any watercourse or conduit, whether open, covered, or enclosed, natural or artificial, or partly natural and partly artificial, by which waters coming or falling upon a property are carried away.

Drainage district. A special district created by petition or referendum and court approval. It has the power to construct and maintain drainage improvements and to pay for the improvements with assessments on the land within the district boundaries. An assessment on the land cannot be greater in value than the benefits of the drainage improvements.

Drainage structures. Structures other than drains, levees, and pumping plants intended to promote or aid drainage. Such structures may be independent from other drainage work or may be a part of or incidental to it. The term includes, but is not restricted to, catchbasins, bulkheads, spillways, flumes, drop boxes, pipe outlets, junction boxes, and structures, whose primary purpose is to prevent the erosion of soil into a district drain.

Drainage system. A system of drains, drainage structures, levees, and pumping plants that drains land or protects it from overflow.

Easement. An acquired right to cross or use another's property.

Eminent domain. The right of the government to take private property through condemnation proceedings. Just compensation must be paid, and the taking must be for a public purpose.

Good husbandry. Generally accepted agricultural practices found in good farm management.

Injunction. A legal writ or command issued by a court and directed to a particular person or corporation, requiring that the person or corporation do or refrain from doing certain acts.

Landowner or owner. The owner of a real property. This term refers to an owner of an undivided interest, a life tenant, a remainderman, or a trustee under an active trust, but not to a mortgagee, a trustee under a trust deed in the nature of a mortgage, a lien holder, or a lessee.

Mutual drain. Drainage agreed to and of benefit to all persons involved. (See "The organization of mutual drainage districts," page 17, and "Drains constructed by mutual license or agreement," page 9.)

Prescription or prescriptive use. Long continued use of another's property to benefit your own property, for example, obstructing a waterway so that the water backs up

on a neighbor's land rather than flows across one's own field. If the prescriptive use is long enough (typically 20 years in Illinois), a legal right may be created to continue the conduct.

Quorum. A majority of those entitled to act. An official board cannot do business unless a quorum is present.

Reasonable use. Use of land to improve drainage such that the benefits of the improved drainage outweigh the disadvantages to lands receiving additional flow.

Registered professional engineer. A professional engineer registered under the provisions of The Illinois Professional Engineering Act and any act amending that act.

Servient land or tenement. See *Dominant land or tenement*.

State of nature. The natural lay of the land and the natural drainage pattern over this land.

Tenement. Land, real estate. This term is generally used, however, to describe real estate having permanent improvements.

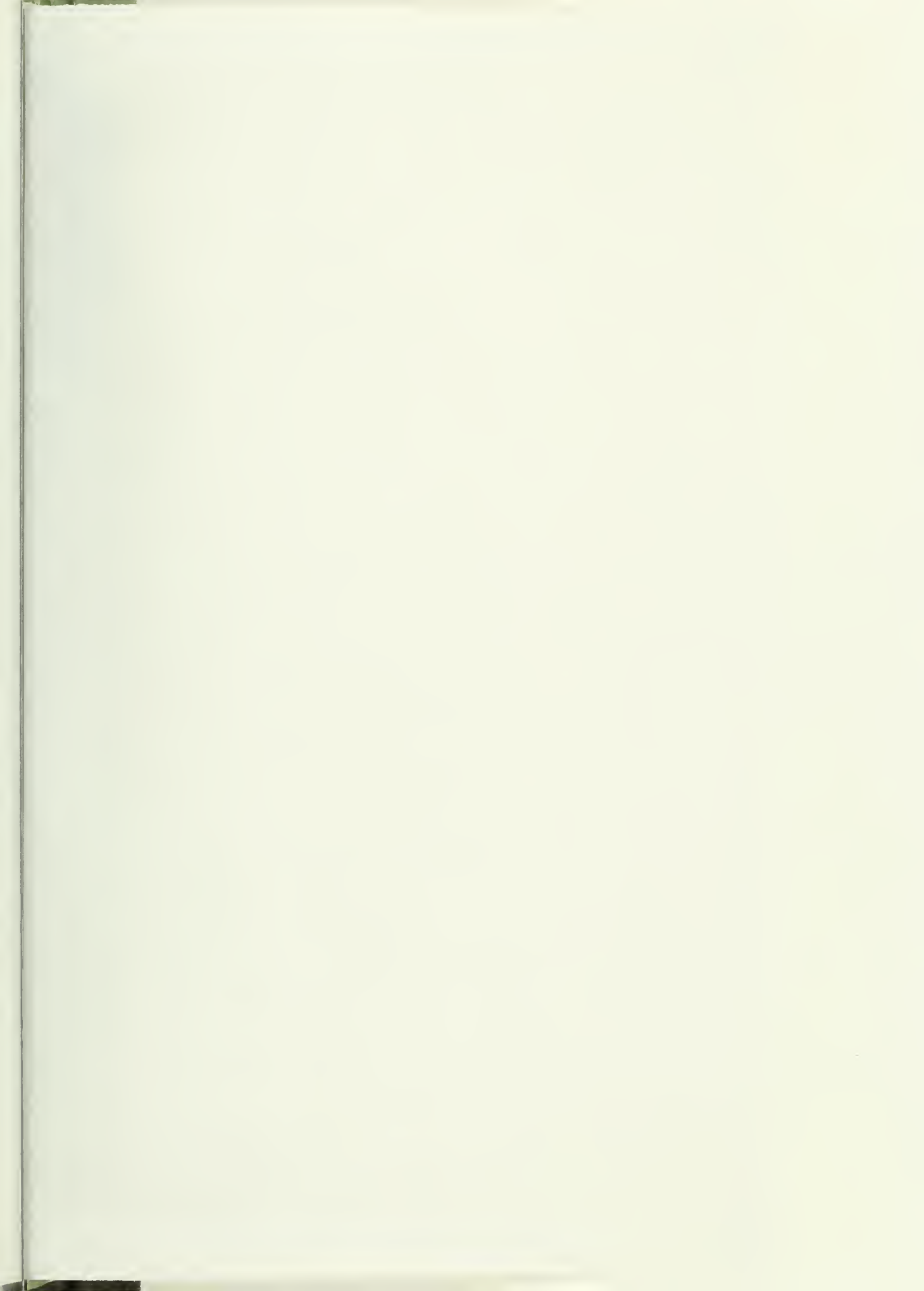
Universal Soil Loss Equation. A formula including such factors as the steepness and length of a slope. This formula is used to estimate the average soil loss from a tract of land.

User. A person or persons who have made continuous use of a roadway, drain, or other artificial structure for some minimum period of time.

User drainage district. A drainage district that is organized to contain land continuously drained by connected artificial drains for some minimum period of time.

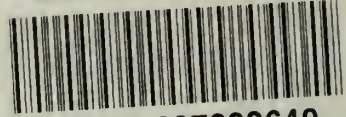








UNIVERSITY OF ILLINOIS-URBANA



3 0112 027992640